FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5414

ILYA WOLSTON,
Petitioner

v.

THE READER'S DIGEST ASSOCIATION, INC., D/B/A READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC., MACMILLAN BOOK CLUBS, INC.; JOHN BARRON,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE NATIONAL NEWSPAPER ASSOCIATION, *AMICI CURIAE*, IN SUPPORT OF AFFIRMANCE

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INTRODUCTION AND INTEREST OF THE *AMICI*

The American Society of Newspaper Editors and the National Newspaper Association, whose interests are set forth below with particularity, hereby submit this joint brief as *amici curiae* in support of affirmance of the decision of the United States Court of Appeals for the

District of Columbia Circuit (578 F.2d 427 (1978)). Letters of consent to the filing of this brief from counsel for all parties have been filed with the Clerk of this Court.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The National Newspaper Association is a national trade association of 5500 daily and weekly newspapers with members in all fifty states. One of the Association's major purposes is to preserve the constitutional guarantee of freedom of the press for community newspapers.

Amici submit that the protection afforded journalists by this Court's "public figure" doctrine is essential to preventing the diminution of the role of the press as an effective force in informing the public about their society and government. The proliferation of libel actions against newspapers during the last two decades threatens to cast the pall of self-censorship over the entire journalism fraternity, resulting in a decreased flow of information to the public and undermining the goal of "uninhibited, robust, and wide-open" debate on public issues, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), repeatedly articulated by this Court. Consequently, *amici* urge this Court to preserve the protections afforded by the First Amendment to discuss the significant people and events of

the day without fear of reprisal except for false statements published with subjective actual malice, by affirming the decision of the court below.

ARGUMENT

I. TO AVOID THE PERNICIOUS EFFECTS OF SELF-CENSORSHIP, THE FIRST AMENDMENT REQUIRES PUBLIC FIGURES TO PROVE "ACTUAL MALICE" FOR RECOVERY IN A LIBEL ACTION

Lying at the very core of the values protected by the First Amendment is the notion that debate on significant public issues and government affairs should be "uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *see Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966); *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940). *See generally* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1965). As Justice Brandeis noted, those who won our independence believed that "public discussion is a political duty; and this should be a fundamental principle of American government." *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (concurring opinion). Recognizing that the right to criticize the activities of the government is inseparable from the right to criticize the actions of public officials, this Court in *Sullivan* imposed the stringent standard of "actual malice" on public officials who sought to recover in libel for defamatory false statements directed against them.

This Court subsequently extended the "actual malice" standard to include public figures in *Curtis Publishing Co.* v. *Butts* and its companion case, *Associated Press* v. *Walker*, 388 U.S. 130 (1967). In his concurring opinion, Chief Justice Warren reasoned that given the close and sometimes symbiotic relationship between the government and

the private sector, it was highly artificial to distinguish between public officials and "public figures," who often have a pervasive influence on government affairs. He stated further that in light of this inextricable connection between "public figures" and government, the *New York Times* "actual malice" standard should be extended to include published statements concerning public figures:

> Since the depression in the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental and business worlds.... In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations....
>
> ...Our citizenry has a legitimate and substantial interest in the conduct of [public figures], and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials."

Id. at 163-64 (Warren, C.J., concurring).

These extraordinary protections for false statements are justified because, as is well recognized, First Amendment freedom of expression must have "breathing space" if it is to survive. *E.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *New York Times Co.* v. *Sullivan*, 376 U.S. at 271-72; *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). However, despite this extraordinary protection, the volume of libel suits brought and the size of damage awards in libel actions have increased dramatically in the last two

decades. 1 A. Hanson, *Libel and Related Torts* vii (1969); Murnaghan, *From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions*, 22 Catholic Univ. L. Rev. 1 (1972). A large damage award constitutes a substantial deterrent to any reporting of the news. A single such award will significantly affect a large organization; it may result in a smaller newspaper's being put out of business. Indeed, even the costs of defending such a suit are enough to deter many publishers from presenting information on important topics to the public. This omnipresent threat of a large libel action results in ever increasing pressure to engage in self censorship to avoid crushing liability. *New York Times Co.* v. *Sullivan*, 376 U.S. at 279. Such a trend should be of grave concern to all citizens and, as in the past, to this Court in particular. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 339-41; *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965); *NAACP* v. *Button*, 371 U.S. at 432.

II. PETITIONER, A PARTICIPANT AT THE CENTER OF A MATTER OF GRAVE PUBLIC CONCERN INVOLVING GOVERNMENTAL AFFAIRS, WHO ATTRACTED MUCH ATTENTION TO HIMSELF, IS A "PUBLIC FIGURE"

In *Gertz* v. *Robert Welch, Inc.*, this Court analyzed the nature of public figures. It concluded that there were two categories of such persons. The first category encompasses those who have achieved pervasive fame or notoriety; the members of that class are public figures "for all purposes and in all contexts." 418 U.S. at 351. The more common type of public figure is an individual who "voluntarily injects himself *or is drawn into* a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* (emphasis added). Thus, even though not numerous, a recognized class of persons exist that are limited public figures through involuntary involvement in significant issues of the day. *Id.* at 345.

Amici submit that although the class of involuntary public figures is limited, Petitioner is a member of that class. The instant case does not involve activities of a personal or private nature, wrongfully disclosed by government action. Rather, it involves governmental activities in which Petitioner, either because of his status or activities, became enmeshed. Because of congressional and grand jury investigations in the 1950's into the activities and identities of Soviet agents in the United States, the Petitioner was in the focus of the spotlight illuminating the most publicly discussed issue of the day. Indeed even the extent to which the Congress and the Justice Department should have pursued their investigations and the methods they employed were, and remain today, hotly contested topics. It is undoubtedly true, as the Petitioner's brief in the Court below argues, that Petitioner would rather have not received any public attention. A Soviet agent would hardly have desired public exposure, and an innocent private citizen, especially one whose relatives were convicted agents, would not be expected to relish the scrutiny of a public investigation. However, the Petitioner's celebrity was very real, and the alleged libel does not extend beyond the bounds of the governmental activity that afforded him that celebrity.

The controversy involved in this case, as well as the controversy that gives rise to Respondents' claim that Petitioner is a public figure, is precisely the type of political controversy that this Court sought to remove from the scope of the ordinary common law libel action in order to ensure uninhibited debate. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 339-40. The Petitioner clearly became inextricably involved in a matter of public concern about the activities of its government. Such a relationship is the type envisioned by this Court when it initially extended the actual malice standard to include public figures. *See Curtis Publishing Co.* v. *Butts, supra.*

Although *Gertz* rejects the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), which extended the actual malice standard to all matters of public interest or concern, *see also Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), it does not quarrel with Justice White's views that there is "no requirement that the reputation or the privacy of an individual involved in, or affected by ... official action can be spared from public view." 403 U.S. at 62. Justice White also stated:

> Discussion of the conduct of public officials cannot, however, be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place.

Id. at 61.

This approach should be contrasted with that taken in *Firestone*. In that case, this Court concluded that the subject matter of the defamation did not constitute a "public controversy" as that term had been used in *Gertz*. 424 U.S. at 454. The dissolution of marriage through divorce implicates privacy concerns, *cf. Boddie* v. *Connecticut*, 401 U.S. 371 (1971), not present in the discussion of people involved in governmental affairs. As *amici* have noted, the discussion of governmental affairs, which is inseparable from the discussion of the personalities involved, has an exalted place among First Amendment values. Such speech is not only a subject for the solicitude of this Court; it is to be encouraged as a fundamental aspect of the American system. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 339-41; *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964); *New York Times Co.* v. *Sullivan*, 376 U.S. at 269-73.

Finally, one salient concern that *Gertz* advanced to reject the position of the *Rosenbloom* plurality was the fear of "forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' . . . ." 418 U.S. at 346. When, as in the instant case, the controversy in question clearly involves the activities of government, the problem of inconsistent ad hoc analysis is minimized. When the controversy clearly and directly involves the activities of government, the decisional authorities of this Court mandate that individuals who have played a major role in the controversy be deemed public figures.

In any event, *amici* agree with, and urge this Court to accept, the analysis of the court below in holding that Petitioner's behavior drew attention to him such as to make him a voluntary public figure. Although Petitioner's actions were not directed toward making himself a public leader or an opinion molder, he must have realized that in a polarized political climate, ignoring a grand jury subpoena after appearing before a congressional investigating committee would open himself up to searching public scrutiny and comment. Moreover, the passage of time has not changed Petitioner's status as a public figure for the limited issues in which he was involved. The same issues—national security and the proper role of the government in dealing with "subversive elements"—are still present. *Cf. Communist Party* v. *Whitcomb*, 414 U.S. 441 (1974). Moreover, to hold that time will vitiate one's status as a limited public figure would seriously hamper historical inquiry into past events, which is necessary to explicate the present and prepare for the future.

Consequently, the Petitioner's involvement in a governmental matter of intense public interest has made him a public figure for the limited purpose of discussing subversive activities in the United States and governmental counteractions.

III. AS THERE WAS COMPLETE ABSENCE OF ANY QUESTION OF MATERIAL FACT ON THE ISSUE OF ACTUAL MALICE, THE COURT BELOW CORRECTLY GRANTED SUMMARY JUDGMENT

The court below was correct in holding that defendants were entitled to summary judgment upon the ground that plaintiff Wolston was a public figure, and that the evidence raised no genuine issue of material fact with respect to the issue of actual malice. In rejecting the proposition that failure to investigate the validity of public documents raised an issue of malice the court stated:

> We reject the argument that Barron was reckless because he failed to make inquiry to verify the statements in the F.B.I. report. Failure to investigate does not itself establish bad faith or recklessness. *New York Times Co. v. Sullivan*, 376 U.S. 254, 287-88, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 733, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). In any event Barron was entitled to rely upon the report of the F.B.I., one of the great investigative agencies of the world, and to believe that the Bureau's investigative skill and resources far exceeded any that were available to him. Moreover, so far as the Soble case was concerned, the report bore upon its face intrinsic proof of its reliability.

Wolston v. *Reader's Digest Ass'n*, 578 F.2d 427, 434 (D.C. Cir. 1978).

This Court has refined the meaning of the actual malice standard, particularly with regard to what constitutes "reckless disregard." This Court has applied the actual malice standard subjectively, on the basis of the actual state of mind of the particular defendants involved.

St. Amant v. *Thompson*, 390 U.S. 727 (1968); *Garrison* v. *Louisiana*, 379 U.S. at 64. Evidence tending to show malice in the sense of ill will or hatred will not satisfy either part of the actual malice standard, even though it might suffice to defeat a "fair comment" privilege under state law. *Rosenblatt* v. *Baer*, 383 U.S. 75 (1965). Moreover, actual malice in the form of reckless disregard requires "a high degree of awareness of probable falsity." *Garrison* v. *Louisiana*, 379 U.S. at 74. In addition

> reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. *Thompson*, 390 U.S. at 731.

In developing these stringent standards of proof, this Court has facilitated the disposition of libel suits at the summary judgment stage when plaintiffs are unable to establish a genuine issue of material fact on the issue of actual malice. Recognizing that prolongation of libel suits involving First Amendment speech might result in self-censorship, lower courts often more strictly observe the summary judgment procedures of Rule 56(e) of the Federal Rules of Civil Procedure. *See* Eckhardt & McKey, "*Caldero v. Tribune Publishing Co.: Substantive and Remedial Aspects of First Amendment Protection for a Reporter's Confidential Sources.*" 14 Idaho L. Rev. 21, 50 n.193 (1977) (including partial list of more than forty such decisions).

Courts that have adopted the position that First Amendment considerations should facilitate summary judgment have expressed the principle in different ways.

They have said, for example, that summary judgment procedures are "an integral part of constitutional protection afforded defendants," *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071, 1075 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971); are the proper vehicle for disposition of cases under the *New York Times* rule, *LaBruzzo* v. *Associated Press*, 353 F. Supp. 979, 982 (W.D. Mo. 1973); are even more essential than in other cases, *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966); and, that summary judgment should be "particularly utilized," *Novel* v. *Garrison*, 338 F. Supp. 977, 980 (N.D. Ill. 1971). Thus, according to the Fifth Circuit, "where a publication is protected by the *New York Times* immunity rule, summary judgment, rather than that on the merits, is a proper vehicle for affording constitutional protection in the proper case." *Bon Air Hotel* v. *Time, Inc.*, 426 F.2d 858, 864-65 (5th Cir. 1970); *accord*, *Time, Inc.* v. *McLaney*, 406 F.2d 565, 566 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969).

A considerable number of other courts, however, appear to be granting summary judgment in cases involving New York Times on the basis of traditional principles, unmodified by First Amendment considerations. *See, e.g.*, *Guam Federation of Teachers* v. *Ysrael*, 492 F.2d 438, 441 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974); *Truetler* v. *Meredith Corp.*, 455 F.2d 255, 258 (8th Cir. 1972); *Hensley* v. *Life Magazine*, 336 F. Supp. 50, 53-54 (N.D. Cal. 1971). Because of the danger that libel threats pose of creating self-censorship, *amici* urge this Court to adopt a rule recognizing that a motion for summary judgment is an integral part of the constitutional protection afforded to an individual exercising First Amendment rights to comment on public figures.

CONCLUSION

WHEREFORE, in view of the above, *amici* respectfully request that this Court affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit, thereby vindicating the freedom under the First Amendment to discuss matters and persons of governmental interest without fear of reprisal, which would inevitably result in self-censorship.

Respectfully submitted,

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